SUPREME COURT OF APPEALS OF VIRGINIA.

HUNTER'S ADMINISTRATOR *v.* CHESAPEAKE & OHIO RAILWAY COMPANY.

January 11, 1917.

ABSENT, PRENTIS, J.

Error to Judgment of the Circuit Court of Rockbridge County.

Curry & Curry and *Timberlake & Nelson,* all of Staunton, for the plaintiff in error.

J. M. Perry, of Staunton, for the defendant in error.

Affirmed by Divided Court.

[Note.—There being no opinion by the Supreme Court of Appeals, the two opinions delivered by the trial court setting aside the verdict as contrary to the evidence in the first case and sustaining a demurrer to the evidence in the second case are here published. A companion case, Chesapeake and Ohio Railway Company *v.* Hunter's Administrator, submitted on the same evidence, to recover damages for the destruction of the intestate's automobile, is reported in 120 Va. 699, 91 S. E. 181.]

In the Circuit Court of Rockbridge County.

1. **Railroads—Precautions at Crossings—Signals.**—The failure of a railroad to give the crossing signal by blowing the whistle is immaterial where persons on the track observed the approach of the train while it was at a distance greater than that at which the statute requires a signal of approach to be sounded.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 132.]

2. **Railroads—Crossing Accident—Contributory Negligence.**—The driver of an automobile who approaches a grade crossing when a train is 2,000 feet or more distant, and when the machine is just on the verge of going upon the track, cuts off the power of the engine and applies the brakes, so that the automobile stops between the rails, is guilty of contributory negligence, and the doctrine of acts done in emergency has no application.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 140.]

3. **Negligence—Contributory Negligence—Acts in Emergency.**—No emergency exists at a crossing, when a train is half a mile away, justifying the driver of an automobile in cutting off the engine power and applying the brakes so as to stop the automobile between the tracks, nor is the doctrine relaxing the effect of contributory negligence as to errors of judgment applicable to an emergency which is self-created.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 392.]

4. **Railroads—Crossings—Presumption That Person Will Remove from Track.**—The engineer of a train approaching a crossing has

a right to presume that an adult man upon a straight track in broad daylight, in the apparent possession of his faculties, trying to roll an automobile off the track, will exercise reasonable care for his own safety and will step aside in time to avoid injury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 130; 11 Va.-W. Va. Enc. Dig. 580; 3 Va. Law Reg., N. S., 321.]

5. Negligence—Crossing Accident—Last Clear Chance—Appreciable Interval.—In order for the doctrine of last clear chance to apply to a collision at a grade crossing it must affirmatively appear that the engineer of the train discovered or should have discovered the decedent's peril in time to have avoided the collision, and an interval of three and one-half seconds elapsing after the discovery of decedent's peril before the brakes were applied is insufficient to charge the defendant with liability.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 973; 3 Va. Law Reg., N. S., 321.]

6. Railroads—Crossing Accident—Contributory Negligence.—One who is well acquainted with the operation of trains and goes upon a grade crossing where the track is straight and the light is good, in full view of an approaching train about one-half a mile distant, notwithstanding his signalling the train to stop, is guilty of contributory negligence in remaining upon the track in an effort to remove his automobile, stalled thereon, and allowing himself no margin of time for escape.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

7. Negligence—Contributory Negligence—Acts of Rescurer of Property.—While it may be conceded that a person may take chances in attempting to rescue his property without being in all cases regarded as guilty of contributory negligence as a matter of law, still there is a clear distinction between the risk which a man may take in rescuing his property, and in saving human life, and in the case of property exposed to danger by the negligence of another he must not act recklessly, but with such prudence as the circumstances will admit of, and the plaintiff cannot invoke even that rule where the property is imperiled by his own negligence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 394.]

8. Negligence—Adopting Dangerous Method.—When two ways of doing a thing present themselves, both of which are equally effective, it is negligence to adopt the more dangerous method.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 385; 9 Va.-W. Va. Enc. Dig. 714.]

9. Evidence—Judicial Notice—Laws of Nature.—Courts will take judicial notice of the primary laws of nature which govern the running of automobiles, as that the cause of the stopping of an automobile on a railroad track at a crossing was due to the acts of the driver in throwing out the clutch to cut off the engine power and

in applying the emergency brake, and not to the fact that the jar of the front wheels passing over the elevated rail "killed" the engine, which was "idling," since the engine was no longer supplying power at the time.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 764.]

10. Railroads—Crossing Accident—Evidence.—Evidence, in an action for the death of plaintiff's intestate by being struck by a train at a grade crossing, viewed from the standpoint of a demurrer thereto, held to show no actionable negligence on the part of the defendant and that the plaintiff's decedent was, in any event, guilty of contributory negligence, requiring a verdict for the plaintiff to be set aside.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142.]

11. Railroads—Crossings—Duty to Look for Train.—Where the view of a railroad track at a grade crossing is obstructed, the duty of a driver to look for approaching trains must be discharged in such a manner as to make looking effectual, and the duty is accentuated in the case of a driver of an automobile who knows that the track is defective and difficult to cross at that point.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 137.]

12. Railroads—Crossings—Duty to Stop.—Where the view of a railroad track at a grade crossing is obstructed, if the surrounding conditions require it, a traveler must stop at such time and place as will enable him to ascertain whether the crossing can be safely made.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 137.]

13. Trial—Demurrer to the Evidence—Consideration of Evidence by Court.—Upon a demurrer to the evidence the court will not adopt that evidence which is most favorable to the plaintiff where two witnesses, both for the plaintiff, make conflicting statements as to material facts, or where the same witness for the plaintiff gives inconsistent testimony upon cross-examination, but in all such cases will consider the evidence for the plaintiff as a whole in order to determine what is established by it.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 533.]

14. Railroads—Crossing Accident—Proximate Cause.—In an action for the death of plaintiff's intestate at a grade crossing while endeavoring to remove from the track his automobile, stalled thereon, where it could not be said that defendant railroad was negligent in failing to check its train, since it was entitled to assume that decedent would remove himself from danger, it could not be held that because the defendant was negligent as to the automobile in failing to check its train upon seeing the obstruction, such negligence created liability for the death of plaintiff's intestate; since, his death being in no wise due to the fact that the automobile was destroyed, it could not be said to be a proximate result of such

negligent destruction, but was the proximate result of his own contributory negligence.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135; 10 Va.-W. Va. Enc. Dig. 372.]

15. Evidence—Expert Opinion—Experience of Witness.—In an action to recover for the death of plaintiff's intestate at a grade crossing under the doctrine of last clear chance a witness who testified as an expert that defendant's train traveling at thirty-five miles an hour should have been stopped in eight hundred or nine hundred feet, and there would be hardly any difference between the distance in which it could be stopped, going at the rate of twenty and thirty-five miles an hour, was not sufficiently qualified, where he testified that his opinion was based upon his experience as an engineer and that upon one occasion his train, approximating in weight the train in question, and going at twenty miles an hour, was stopped in a distance of nine hundred feet upon the application of emergency brakes due to the breaking of the air hose.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 785.]

16. Trial—Demurrer to Evidence—Law of Physics.—Upon a demurrer to the evidence although the evidence is considered favorably to the demurrer, yet the court must take note of the laws of physics, as that the energy or force of a moving body equals in tons the result of its weight in tons multiplied by the square of its velocity in feet per second divided by twice the force of gravity at the earth's surface, and hence must disregard the testimony of a witness that a train could be stopped in practically the same distance while going at the rate of twenty and thirty-five miles an hour, a simple calculation showing that the force or energy in such case would be in about the proportion of 4 to 9.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 573.]

First Opinion.

Holt, J. This is a motion brought by the plaintiff to recover from the defendant damages because of the death of plaintiff's decedent which it is charged was due to negligence of the defendant company. The cause came on to be heard. It was submitted to the jury. That jury returned a verdict for the plaintiff in the sum of $10,000.00. It, the court, is asked to set aside as being contrary to the law and the evidence.

The accident which occasioned the death of plaintiff's decedent occurred at the station called Bells Valley in Rockbridge County at a public crossing.

Roughly speaking, the railway's track at this point runs east and west. The county road north and south. The grade slopes slightly to the west and is sufficient for a train to roll down it under the power of gravity alone. The grade of the county

road runs from south to north, that is to say, one crossing the right of way from the south goes up grade.

On Sept. 27, 1914, a heavy, double-headed freight train was going west at a speed of between thirty and thirty-five miles an hour. Mr. Hunter, Mrs Hunter, Mrs. Via, Mrs. Daniel and three children were in an automobile going north. Just before the automobile crossed the track, that is immediately before it did so, some one in the machine said that a train was coming. This was just before the machine went upon the main track. Mrs. Hunter, who was driving this machine, applied the brake and the machine stopped on the main track. At that point the ballast was worn down so that the track rails stood up from two to three and a half inches above its level. According to the plaintiff's evidence, the train was at that time somewhere between 2,000 feet and a half mile distant. All of those in the machine got out. They signalled to the approaching train to stop and Mr. Hunter first attempted to crank up the machine so that it might run off under its own power. Failing in this, he went to its side and with the aid of his wife, attempted to push it from the track. He failed in this also, and while still on the track was struck and killed by the approaching train.

[1] There is some confusion as to when the signal for the crossing was given and if the necessary whistles were blown, but we need not concern ourselves about this. Mr. Hunter saw the train when it was yet 2,000 feet or more away and no crossing signal has to be given more than 300 yards distant. In other words, if he saw the approaching train, it does not make any difference whether whistles were blown or not, so far as they might have been intended as signals of approach.

[2] It is also said that the automobile party did not take the necessary precaution to ascertain if the train was approaching and were in that respect guilty of negligence. It is not necessary to inquire closely into this, for the plaintiff's evidence tells us that at a time when the train was 2,000 feet or more distant and when her machine was just on the verge of going upon the track she put on brakes. That was an act of negligence in itself and it makes no difference whether she had been guilty of negligence before then or not. It was not an act done in emergency, for then no emergency existed. Had she not applied the brakes and had applied sufficient power, the machine being in low gear, it would have passed over the track in safety, and the fact that the rails stood up from two and a half to three inches above the roadbed could not have stalled this car had it been in good working condition, and there was nothing to show that it was not. The evidence is that it was a new machine in good condition.

Conditions thus disclosed may be summarized. The automobile was stalled on the track in front of a train from 2,000 feet to half a mile distant and which was approaching at a rate of 30 or 35 miles an hour. The immediate reason for this stalling was the fact that the chauffeur either from nervousness or from some other cause applied the brakes when she should have put on the power and that she did this at a time when no emergency existed. Ullrich *v.* Cleveland Railroad, 55 N. E. 95-97, an Indiana case. The emergency which shortly followed was due primarily to this act of negligence.

[3] Normally, no emergency exists at a crossing, when the train is half a mile away, nor does that relaxation of rules applicable in cases of emergency apply, when they are self imposed. C. & O. R. R. Co. *v.* Hall's Admr., 109 Va. 296.

To make the defendant liable, it must have been guilty of some act of negligence which was the proximate cause of the disaster, and the plaintiff decedent must not have been guilty of contributory negligence.

[4] Taking the case as made by the plaintiff, the conditions were these: The engineer on the controlling engine saw, or should have seen, that an automobile obstructed the track at its crossing and saw, or should have seen, that Mr. Hunter was attempting to push it out of danger. Did he have to assume that Mr. Hunter would step aside when there was yet time or was he charged with knowledge that he would continue in his position until it became one of peril, which might possibly result in an accident. The track a straight away one and it was broad daylight. Hunter could see the approaching train as well as its engineer could see him.

The engineer saw Hunter, a man in the apparent possession of his faculties, trying to roll an automobile off the track. Did he have a right to assume that Hunter would step aside in time to save himself, for be it remembered we are not dealing with a loss occasioned by the destruction of property, but with a loss which it is sought to establish because of the death of Hunter. This court has already entered judgment for the value of the automobile. In Norfolk & Western R. R. Co. *v.* Dean, 107 Va. 505, our court of appeals said:

"And in Savage *v.* Southern Ry. Co., 103 Va. 422, 49 S. E. 484, it is said: 'It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track, in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety.

The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger—that is to say, when he saw, or ought to have seen that Savage was himself unconscious of his peril, and would take no measures for his own protection. This proposition has been decided in numerous cases by this court."

It is true that Hunter signalled the engineer to stop. That was notice to him, that the automobile was on the track might be destroyed, but not that Hunter would himself remain here until he was injured. It is also said that Hunter's foot was caught, but it does not appear that the engineer was charged with knowledge of this fact at a time when he could have avoided the accident. Hunter, according to the uncontradicted evidence, was doing everything in his power to save his machine and he did not desist in this until the train was upon him. It was then too late. It is probable that he would have attempted to step aside sooner, had the train approached him more rapidly and it is equally probable that he would have continued in his effort to extricate his machine longer, had the train come more slowly. This was an uncompleted task. He did not attempt to leave the track because it was accomplished, but because the train was upon him. In his effort to rescue his automobile, he remained in a place of danger until the last possible moment, and then found himself, according to the plaintiff's evidence, entrapped.

Plaintiff's evidence tending to show the distance of Hunter from the engine when it was first possible to see that his foot was caught is not satisfactory. Luck is the only witness who undertakes to fix this distance. At pages 15, 34 and 38 he says that it was six rail lengths, or 180 feet, and at pages 16 and 39 he says that it was about 12 rail lengths, or 360 feet. There is evidence also for the plaintiff tending to show that the brakes were not applied until the front engine was six rail lengths from the crossing. Luck so states. But he also states at page 31 that he was not watching the engineer at that time, but judges that such was the fact because of the noise of the brake shoes which he then heard. He was at this time, as we have seen, running down to help Hunter and already gone three rail lengths, or ninety feet in his efforts to do so.

[5] Giving the plaintiff the benefit of all doubt, we have these conditions. Hunter remained on the track in the face of a train approaching at the rate of 30 to 35 miles an hour with no effort to escape until it was within 360 feet of him. Up to that time, he evidently thought that he had sufficient time in which to retire to a place of safety and there is nothing to indicate that the engineer had reason to believe that he would not

do so. At this point, he attempted to leave and found his foot caught. Assuming that the engineer should have seen this at once, he did not get the power of the brakes actually applied to the wheels until his train had gone 180 feet. The train stopped 22 or 23 rail-lengths beyond the crossing. P. 18. From the first moment that the engineer could possibly have seen that Hunter was caught until the braking power reached the wheels, about 3½ seconds elapsed. Does this impose any liability? Does the doctrine of the last clear chance apply to such a state of facts? In order for this doctrine to apply, it must affirmatively appear that the engineer in charge saw, or should have seen Hunter's peril at a time when it was yet possible to avoid the accident—there must be a clear chance.

Our Court of Appeals has had occasion to deal with this matter very recently. In Chesapeake Western R. R. Co. *v.* Shiflet's Admr. 11 Va. Appeals, page 11, it appears that a fraction less than three seconds elapsed after the peril was discovered before the brakes were applied. In this case, more than 3½ seconds could not possibly have elapsed. There the court said:

"It is clear that the mental and physical faculties of the other men would have had to act with more than human precision and with the quickness of electricity, to utilize the scant time and distance thus remaining in saving this man from the wholly unexpected and unlikely emergency which his inexplicable conduct had precipitated. If they had succeeded, it would have been by the merest chance. The law does not impose liability under such circumstances. As was suggested by Judge Keith in Norfolk Southern R. R. Co. *v.* White's Admrx., 117 Va. 342, 10 Va. App. 225, 'the minds, nerves and muscles of men are not so accurately co-ordinated as that there can be instantaneous action to meet an emergency.'"

We have seen that Luck was not looking at the engineer when the brakes were applied, and it is hard to believe that he was in a position to state with exactness when that was done. When this witness first saw that Hunter was caught, he was 180 feet distant. The engineer was 360 feet away. At that time Hunter was crouching down in an attempt to roll the machine back, pushing against the front wheel. Powell, page 49, says that he was struggling, seemed to have his foot fast, and that he got it loose just as the train was on him and straightened up and jumped backwards. In these circumstances, it would have been extremely difficult for a man 120 yards away to see that this unlooked-for incident had occurred. The engineer says that he did not see it and it is not reasonable to suppose that he would have seen it at such a distance until Mr. Hunter straightened himself up in an apparent effort to escape. It is believed that

the doctrine of the last clear chance has here no application. And that the defendant was guilty of no negligence that occasioned the accident.

[6] But let us, for the sake of argument, assume that the road was guilty of negligence. Was not Hunter guilty of contributory negligence? He was a man well acquainted with the operation of trains. The track was a straight away one. The light was good. He saw it approaching for something like half a mile and though he signalled it to stop, he was charged with the duty of observing whether or not his signal was being obeyed. He went upon the track and remained there in an effort to save his machine until a time when it was impossible for him to escape, unless everything was favorable. He allowed himself no margin whatever. The slightest mishap might prove fatal. A man may not attempt to cross in front of a moving train under conditions which would have made it only possible by a narrow margin. If his horse balks upon the track and an injury is inflicted, that is a risk assumed.

Backus *v.* Norfolk & A. T. Co., 112 Va. 292.

[7] But it is said that a man may take chances in attempting to rescue his property and the court is cited to Illinois Ry. Co. *v.* Siler, 15 L. R. A., N. S., page 819 and to Sherman and Redfield on Negligence, Sec. 85 D. 6th Ed. Both of these authorities say that the plaintiff must not act recklessly, but with such prudence as the case will admit of. There is a clear distinction between the risk which a man may take in rescuing his property and in saving human life. In Elliott on Railroads, Sec. 1265, H., it is said:

"If a person puts himself in a position of danger in front of an approaching train, in order to rescue property from injury or destruction, he is generally regarded as guilty of contributory negligence as a matter of law, and there can be no recovery of damages for personal injury or death."

In Morris *v.* Lakeshore Ry. Co., 42 N. E. 579, (N. Y. 1906) it is said:

"A person could not place himself in a situation of danger simply for the protection of his property without being guilty of such negligence as would preclude his recovery."

In Schneider *v.* Railroad, 133 N. Y. 583, 30 N. E. 752, it was said:

"If the party by his own negligence has placed himself in a situation of peril, and being called upon in a certain exigency to act, mistakes his best course through an error of judgment, he is not thereby relieved."

This, as we have already seen, is an exact statement of the law as laid down by the Court of Appeals in the case of C. & O. Ry. *v.* Hall, 109 Va. supra.

The evidence shows that the front wheels of this automobile were between the track rails. The rear part of the machine projected across the south rail to a distance at which a man could have rolled the machine back with safety, or to a point at which he would have been safe had his attempt to do this been unavailing.

[8-9] The train was far enough away for Hunter to have weighed these matters and to have acted with prudence. When two ways of doing a thing present themselves, both of which are equally effective, it is reckless to adopt the dangerous method. But suppose we assume that the emergency was so pressing as to prevent Hunters acting with the judgment of an ordinary man. It was still an emergency for which he was primarily responsible, for, as we have seen his chauffeur, when the machine was running in low gear, and, therefore, most powerful, and when the train was something like half a mile distant, threw out the clutch—that is to say, cut off all power from the engine—and put on the brake. It was this which caused the car to stop on the track and not "the jar" occasioned by the front wheel passing over the rail elevated above the ballast from two to three and a half inches.

The evidence of Mrs. Hunter on this point is of such importance that it will be in part re-stated here, p. 89.

Q. Were there three speeds on this Maxwell, high, intermediate and low gear?

A. Yes, sir.

Q. You spoke of putting on the brake cutting off the power, don't you have to do that by separate motions?

COURT: Does the emergency brake throw the clutch out?

A. Throw the clutch out with your foot.

MR. PERRY: You throw the clutch out with your foot and throw the emergency brake on with your hand?

A. Yes, sir, and it has a foot brake.

Q. On this particular evening did you use the foot brake or hand brake?

A. The foot brake.

Q. Did you throw off the clutch at the same time or not?

A. Yes, sir.

Q. You threw off the clutch so the machine had no power?

A. Yes, sir.

Q. And put on the foot brake just before you got to the track?

A. Yes, sir.

Q. You did that because Mr. Hunter said "A train is coming?"

A. Yes, sir.

Q. The machine, then, was without power and the brake was on, and as I understand it, it went across the rail and stopped right against the rail with the front wheels right against the rails?

A. Run over the rail.

Q. And stopped with the rear part of the front wheels against the south rail?

A. Yes, sir.

Q. Just dropped over?

A. Yes, sir.

Q. And your engine went dead right then?

A. Yes, sir.

Courts will take note of the laws which govern the running of machines, that is, the primary laws of nature. Nobody who has ever run an automobile can read this evidence and have any doubt as to why the machine stopped.

This principle runs through those cases which hold that a man may take reasonable risk in saving his property from danger. The danger must not have been due primarily to his own negligence.

In Illinois Ry. *v.* Siler, 15 L. R. A., 819, supra, (cited and relied upon in plaintiff's brief) or rather in a note appended thereto by the editor of that series, the law is thus stated:

"One whose property is exposed to danger by *another's negligence* (italics ours) is bound to make such effort as an ordinarily prudent person would do to save it or prevent damage to it."

Mr. Philip Moore in direct examination says that the power was not cut off of the second engine promptly, but his cross-examination shows that he has no sufficient reason for this statement.

[10] We have considered this cause as upon a demurrer to the evidence and have dealt with the case as the plaintiff has developed it. All of the testimony shows that the stop signal was seen practically as soon as it was given. The engineer in charge says that he did all he could to stop his train. It is intrinsically improbable that he would make no effort to check it in broad daylight, when he saw the track obstructed by an automobile and its occupants signalling him to do so, and at a time when he was sounding the danger signal. It is, therefore, entirely probable that these witnesses, in the face of this impending tragedy, were mistaken as to time and distance and that the emergency was so imminent as to admit of no clear thinking. In these circumstances, we can well understand how this distressing accident could not well have been avoided. But whether this be true or not, this court is of opinion that the evidence shows no actionable negligence on the part of the defendant and that the plain-

tiff's decedent was, in any event, himself guilty of contributory negligence. The verdict must be set aside.

SECOND OPINION.

HOLT, J. At the first trial of this cause, it was submitted to the jury. That jury returned a verdict for the plaintiff in the sum of $10,000 which the court set aside as being contrary to the law and the evidence.

At this trial, a demurrer to the evidence is interposed. Subject to the judgment of the court upon demurrer, a verdict for $10,000 is again returned.

We need not concern ourselves with nice distinctions between the rules governing in the one case and in the other. In the first, the court should have and probably has a latitude not allowed in the second. This, however, is an academic distinction here. The first verdict was dealt with as upon demurrer to the evidence, and, of course, this must be.

The opinion here is in a measure supplementary to the opinion, making a restatement of the facts unnecessary.

Upon demurrer, it appears that the crossing was defective. It also appears that Mrs. Hunter had full knowledge of this defect.

[1] The automobile was on the track and those in it saw the train approaching at a distance greater than that at which a signal of approach must be sounded. The failure to give this signal of approach therefore, is unimportant.

[11] The view of the track was obstructed. This necessitated extra vigilance on Hunter's part. The duty to look must be discharged in such manner as to make looking effectual. Lumber Co. *v.* Shumate, 11 Va. Appeals, 390-393—a duty accentuated in this case, because the track was known to be defective.

[12] And if surrounding conditions are such as to make it necessary plaintiff must stop, and he must stop at such time and place as willl enable him to ascertain the necessary facts in order to determine if the crossing can be made in safety. Wash. & O. D. Ry. Co. *v.* Zell's Adm'r, 11 Va. App. 623.

[2] Owing to the location of a box car on the south side track, the front wheels of the automobile could not have been more than five feet from the south rail of the main track when the train was first seen. It was then half a mile away and no emergency existed. Ullrich *v.* Cleveland R. R., 55 N. E. 95-7. The machine was in low gear and thus was in condition to utilize its utmost power. In these circumstances, Mrs. Hunter, instead of permitting the continued application of that power, cut it off—threw out the clutch—and applied the brakes. P. 103. With the power thus off and brakes applied, this car by its own momentum ran a few feet forward. The front wheels went over

the south rail of the main track and stopped between the rails and not against the north rail. In other words, the track was not so defective as to prevent this car going slowly, with the power off and brakes applied, from passing over the south rail and coming to a stop between the rails. It is, therefore, clear, beyond peradventure that this car stopped where it did, not because the road bed was defective, but because the driver stopped it there.

Some point is made of the fact that the engine stopped when the front wheels of the car dropped over the south rail of the main track, but this is unimportant. If the engine was cut off, that is to say if no power went from it to the car, it made no difference whether it was running or not. Immediately upon the stopping of the car, they got out. P. 108. They did not get out because the engine had stopped, but because the car had, and the car, as we have seen, stopped not because the track was defective, but because its driver had stopped it. In other words the perilous situation thus created was due directly to the plaintiff's negligence. It is true that the evidence for the plaintiff is that Mr. Hunter could have rolled the car south and off the track but for the undue elevation of the south rail. But had the power been applied to the automobile and not cut off the car would in all probability have gone on and necessity for rolling it backwards would never have occurred. We, therefore, reach this point in the consideration of the case. This automobile was stopped by its driver on the main track of the defendant's railroad and this act was due primarily to the negligence of Mrs. Hunter, who was decedent's chauffeur and driving his car for him.

It follows that there can be no recovery under the established practice in this state, unless it can be predicated upon the doctrine of the last clear chance.

The evidence of the plaintiff is that Hunter immediately signalled the approaching train to stop and that at the time he so signalled it, there was yet time for it to have done so and have avoided the accident altogether. When Hunter had thus signalled the approaching train, he went to the front of his machine and attempted to "crank it up." Because of his excitement, or for some other reason, he was unable to do this. He then went to the side of his machine, crouched down and attempted to roll it south and clear of the track. He rolled it back until the two front wheels of his machine struck against the south rail, but was unable to push it further. While engaged in an attempt to do so, however, he was struck and killed.

[4] It has long been the law in this state that an engine driver who saw an adult in the apparent possession of his fac-

ulties in front of an approaching train had a right to assume that he would step aside in time to avoid accident. Hunter was a grown man in the possession of his faculties. The engineer as an original proposition had the right to rest secure in this presumption, and his duty did not shift until such time as something was brought to his attention which served to indicate either that Hunter did not intend to remove from danger or was unable to do so. To meet this requirement, it is said on Hunter's behalf that his foot was caught between the guard rail and the south rail of the track. Assuming this to be true, it is of importance to ascertain when the engineer first saw, or should have seen, this added peril.

Hunter was crouching down pushing against the automobile with all his strength. Luck was a witness who stood in the direction from which the train was coming and was observing conditions closely. On direct examination, at page 14, he says:

"Q. When you noticed that his foot was hung, did you look to see where the train was?

A. I looked back again; it was inside of the switch whistling, blowing the danger whistle."

At page 15 he is asked:

"Q. How far were you from him then, when you saw that his foot was fast?

A. I was about six rails.

Q. You were about six rails?

A. Yes, sir.

Q. Now, when you saw his foot was fast you immediately looked around you say?

A. Yes, sir.

Q. Now when you looked around where was the front of the first engine?

A. The front of the first engine was then just even with me.

Q. I want to know when you first noticed that his foot was fast in the rail, where was the front engine?

A. It was just about the mail crane.

Q. And the mail crane is how far away?

A. Twelve rails and a half."

On cross examination, page 33, he says, when asked how Hunter's foot was caught: "I didn't have much time to see. The train was just about past me when I noticed it."

Q. "The train had just about passed you when you noticed it?

A. Yes, sir."

At page 35 he says that the engine was blowing the danger signal when Hunter called get out of the way.

On re-direct examination he is asked, p. 35:

"Q. How far away was the front engine, in your judgment, now, from Mr. Hunter when you saw that he was fastened?

A. Didn't I tell you it was about six rails?

Q. How? Six rails from where you were? I don't mean that, how far was the front engine from Mr. Hunter when he got his foot fast. I say, how far was the front engine from Mr. Hunter when he got his foot fast?

A. I just couldn't say that, I couldn't measure that.

Q. Well, about where do you think the front engine was?

A. Just before it passed me.

Q. It was before it passed you?

A. Yes, sir.

Q. The engine hadn't passed you when you saw his foot was fast?

A. Just at me.

Q. I understand you to say in your examination in chief that the front engine was about the mail crane when you first saw Hunter's foot was fast; is that correct?

A. It wasn't far from the mail crane, but the rate the train was running it runs mighty quick on you.

Q. Do I understand the front engine was about the mail crane?

A. Now, I just won't say about the mail crane.

Q. But it was before the train passed you?

A. It was before the train passed me.

Q. It was before it passed you?

A. Yes, sir.

Q. You won't say just how far it was?

A. No, sir."

This is the witness relied upon by the plaintiff to fix the distance at which the train was from Hunter when he first became apparent that Hunter's foot was caught. At that time, this witness Luck was himself 180 feet distant and it is apparent from the foregoing evidence that the front engine of the train was right on him. He so states in his direct examination. He repeats this statement on cross examination and he repeats it in re-direct examination, although it is apparent in the re-direct examination that it was so shaped as to lead him in the direction of placing it at a more distant point. It thus appears that when the engineer saw, or should have seen that Hunter was not in a position to step out of danger he was so close upon him as to make the accident unavoidable. C. & W. R. R. *v.* Shifflet, 11 Va. Appeals, page 11. And it further appears from the plaintiff's evidence that it was about this time, or earlier, that the brakes were applied; that is, that they were applied when the engine was about even with Luck.

[13] In considering the law applicable to demurrers to evidence, our Supreme Court in Virginia Iron Coal, etc., Co. *v.* Kiser, 105 Va. 695-702, says:

"We have, then, the statements of this witness, not only inconsistent with, but contradictory of the other two witnesses for the plaintiff, as to the situation where the accident occurred. According to the two witnesses, the theory suggested by the other as to how the accident was caused was a physical impossibility, and we know of no rule that requires the court to disregard the evidence of two witnesses, and accept that of one, merely because one is more favorable to the plaintiff than that of the two."

See also Hicks *v.* Romaine, 116 Va. 401-411.

In other words, if two witnesses testify to one state of facts and one to another, both for the plaintiff, the court is not obliged to discard the evidence of the two witnesses and accept that of the one; and for a stronger reason, where a witness makes a number of conflicting statements as to a material fact, the court is not obliged to discard all of these statements except the one favorable to the plaintiff, even upon demurrer to evidence. This is not only good law, but it is good sense. If it were not true, a witness might in direct examination make statements which would justify a recovery and yet upon cross examination might admit that the statements made in direct examination were untrue. You could take his direct examination and find a verdict upon it. We must take his evidence as a whole in order to determine what is to be regarded as established by it. Any other rule would make cross-examination more than worthless. Admissions of inconsistencies would be unavailing; while statements confirmatory of the original declaration could be availed of. In the light of this law and reason, we reach the conclusion that we can look to the whole evidence of this witness in order to ascertain the whereabouts of the front engine when it was first seen that Hunter's foot was caught, and that evidence, it is believed, points to the fact that the engine was immediately upon the witness.

[14] It is next said that if we concede that the defendant was not guilty of negligence in failing to check its train because Hunter was on the track, it was negligent in failing to check it because the automobile had been stalled there and that, since it is guilty of negligence in this particular, it is guilty of all results that flow from that negligent act, and the court has been cited to an elaborate discussion of the law of proximate cause in Shearman and Redfield on Negligence, where the law of different states is discussed. Our court in Chesapeake & Ohio Co. *v.* Wills, 111 Va. 32-36, quotes with approval this statement:

"On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could in the exercise of reasonable foresight have foreseen as the probable consequences of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. * * * The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which existed (whether they could have been ascertained by reasonable diligence or not), would at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

Our court said in that case, these principles are in accordance with its decisions. As an illustration of the law invoked by the plaintiff, we might note the case of Illinois Central R. R. Co. *v.* Siller, 15 L. R. A., N. S., page 819. In that case the railroad negligently set fire to some grass. Mrs. Mullen attempted to put this fire out. She herself caught fire in this attempt and was killed. The road was held liable. It is believed that this is an extreme case and goes beyond the rule which our court has adopted. But even here, we see that the accident to Mrs. Mullen was the culmination of a series of acts originating in an act of negligence for which the road was directly responsible. To illustrate: If the gasoline in the tank of this automobile had caught fire when it was destroyed and if that fire had burned some neighbor's house, and in that house some child had lost its life therefrom, we would have had a series of acts, all of which went directly back to a negligent one for which the road was liable. But whatever view a court may adopt as to the extension of the application of the doctrine of proximate cause, the rule adopted *mutatis mutandis* applies alike to primary negligence and to contributory negligence. Any incident held to be the proximate result of primary negligence must of necessity, if it

result from contributory negligence, be regarded as the proximate result of it. Hunter was not killed by the fragments of the automobile. His death was in no wise due to the fact that the automobile was destroyed. It follows that his death can not be traced to the negligent destruction of the automobile, but to an antecedent cause.

[7] Again it is said by way of relieving Hunter from contributory negligence that he was killed in an effort to save his property from destruction. Elliott on Railroads, § 1265, says that the immunity claimed here obtains only when the attempt is one to save life. There are authorities which have adopted a more liberal rule.

"One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent danger to it." 1st Shearman & Redfield on Negligence, 6th Ed., note page 213.

In Railroad Co. *v.* Siller, supra, it is said:

"One whose property is exposed to danger by another's negligence, is bound to make such effort as an ordinarily prudent person would do to save it or prevent damage to it."

But that is not our case. Hunter's property was not put in peril by another's negligence, but by his own. It is elementary that a man cannot negligently create a situation of peril for himself or his property and then with impunity expose himself in an attempt to rescue it. One act of negligence in such case is built upon another. Surely Hunter could not have remained on this track had his automobile not have been there. If he negligently placed it there, that could by no process of sound reasoning give him an added right. It is urged that it was his duty to attempt to rescue this machine. It may be that it was his duty to the railroad to attempt to remove from its highway an obstruction which he had placed thereon, but this is a liability and not a privilege.

[8] This also is true. Only the front wheels of the automobile were on the track. The rear of that machine was not, and one standing by it would have been in comparatively little danger. It could have been pulled from the track as well as pushed. Hunter, with the safe and unsafe method for extricating his car before him, chose the latter, and if it be said that he did this in an emergency, the answer is that it was an emergency for which he was responsible.

It is also said that the railroad was negligent in that the power from the second engine was not cut off; indeed that it was not cut off until that engine was four, five, or six rail lengths beyond the crossing (p. 88). At page 93 the witness was asked:

Q. How do you know she was pulling?

A. Well, I could not see any way but what she would be pulling.

Q. You come back to the same thing, that you saw the exhaust and heard the exhaust, and therefore think she was pulling?

A. Yes, sir, and while I was watching the engine the driving rods looked like they were working in the same direction.

Q. You could not see the spokes in the wheel?

A. No, sir.

Q. Don't the driving rods go in exactly the same direction whether the engine is going forward or backward?

(No response.)

A very rapid exhaust does show that a locomotive is pulling, but frequently there is an exhaust from an engine when the train is standing still, due, it is believed, to some manipulation of the air, but however that may be, this fact remains and is one of common knowledge, and the sound is the same, but does not approach that of an engine pulling hard up grade.

But if we assume that this evidence on demurrer is sufficient to show that the power of the second engine was not cut off, yet the fact remains that this engineer neither saw nor could see Hunter. His view was cut off by the front engine. And if he had seen him he was entitled to the same presumptions that the engineer of the first engine was, namely: that Hunter would remove himself from his place of peril in ample time.

But whether the power from the second engine was cut off or not, the emergency brakes had been applied to it, and there is nothing to show the propelling power of an engine independent of its momentum in such circumstances.

[15] As a matter of fact, did the train stop with a due promptness when the emergency brakes were applied? The defendant's evidence shows that it did—that a good stop was made. To meet this W. W. Matthews was introduced to testify as an expert. He says that in his judgment this train should have been stopped in 800 or 900 feet (p. 81). He bases this statement upon his experience as an engineer. He says that upon one occasion when the emergency brakes were applied by reason of the breaking of the air hose, his train, which approximated in weight this train, and which was going at twenty miles an hour, stopped at a distance of 900 feet. This was the only instance in his knowledge when conditions approximated what they were here. At page 83 he was asked:

Q. By the Court: Do I understand you to say that such a train as has been described here could be stopped—that there would be practically no difference between the distance in which

it could be stopped going at a rate of twenty and thirty-five miles on hour?

A. Such a little difference, Judge, I do not think it would be hardly any.

Q. By Mr. Timberlake: After you pass 20 miles an hour, as I understand then, the speed does not make any very great difference?

A. Not after that, no, sir.

Q. By Mr. Perry: That is all guess work with you, isn't it?

A. No.

Q. I say you have never seen it done?

A. Not in emergency, no, sir.

So that this expert witness has had no experience in stopping a train approximating this train in weight except upon one occasion, and then his train was running at about twenty miles an hour, and he says that you can stop such a train going thirty-five miles an hour about as quickly as you can stop one going twenty miles an hour.

[16] Even upon a demurrer to the evidence the court must take note of the laws of physics.

The energy or force of a moving body

$$\text{equals} \ldots\ldots\ldots\ldots\ldots\ldots \frac{\text{weight} \times \text{velocity}^2}{2g}$$

g equals 32.2 at the earth's surface

Velocity—no. feet traveled per second.

20 miles per hour equals 29 feet per second.

30 miles per hour equals 44 ft. per second.

1500-ton train at 20 mi. per hour

$$\text{equals} \ldots\ldots\ldots\ldots 1500 \times (29)^2 \text{ equals } 19590 \text{ tons}$$

$$\frac{}{64.4}$$

1500-ton train at 30 miles per hour

$$\text{equals} \ldots\ldots\ldots 1500 \times (44)^2 \text{ equals } 45090 \text{ tons}$$

$$\frac{}{64.4}$$

In other words, this proportion is about that of four to nine, and if the train which killed Hunter was going at thirty-five miles an hour it would be much greater. It would seem, therefore, that the conclusions of this witness as to the distance within which such a train could be stopped are inherently improbable. Mitchell *v.* So. Ry. Co., 11 Va. App. 549, and we are driven back, therefore, upon the evidence of the defendant in order to ascertain whether or not the train in question stopped as

promptly as it was reasonably possible for it to stop if the brakes were applied. That evidence is to the effect that it did.

[7] The evidence at this trial does not materially differ from that at the first, save in this particular; it pushes back the time at which Hunter's foot was caught, but it does not push back the time at which that was or should have been seen by the engineer. The result of this is to relieve Hunter of the charge of recklessness, that is to say, it brings him within the rule contended for by some authorities, to the effect that a man may expose himself in an attempt to rescue his property, provided he does not do so recklessly. But it is to be remembered that these authorities qualify their rule, and its extensions by this important and fundamental modification. The exposed property must not have been negligently exposed by its owner. We have already reached the conclusion that in no circumstances does any immunity attach where the circumstances make it appear that the exposure of the property sought to be saved was the direct result of its owner's negligence.

[4] We are thus brought back to the rule heretofore adverted to—the engineer had a right to believe that this man in the apparent possession of his faculties would remove himself from danger at the proper time, and the engineer had the right to rest securely in that presumption until some fact was brought to his attention which indicated to him that Hunter either would not or could not do this. And this proposition in its turn is to be considered in the light of the fact that the situation from which all the trouble came had its inception in the plaintiff's negligence in stopping the automobile upon the defendant's track. We are not really concerned with what the engineer should have seen, for the evidence is that he was looking, that he saw Hunter upon the track, and Luck's evidence tells us when it was possible for one looking down the track to see that Hunter's foot was caught.

For these reasons filed and made a part of the record, the court is of the opinion that the demurrer to the evidence must be sustained.